SUPREME COURT NO. 81998-0
COURT OF APPEALS NO. 37574-5-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM & NATACHA SESKO,

Petitioners,

v.

CITY OF BREMERTON,

Respondent.

MOTION TO MODIFY COMMISSIONER'S RULING

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I. IDENTITY OF MOVANT/PETITIONER

Petitioners/movants are William and Natacha Sesko (the "Seskos").

II. COMMISSIONER'S DECISION

Petitioners seek modification of a decision of the Commissioner of this Court filed on October 3, 2008, a copy of which is attached in the Appendix, which denied review of a decision of the Court of Appeals, Division II, filed on July 1, 2008.

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in denying petitioners' Motion To Allow Late Filing of a Notice of Appeal?

IV. STATEMENT OF THE CASE

This matter involves an attempt by the City of Bremerton to recoup the alleged costs of abating a nuisance on the Sesko property. The City's abatement contractor removed substantial quantities of the Seskos' personal property – vehicles, heavy equipment, and building materials – and delivered them to scrap dealers. The abatement contract purported to transfer title to the personal property removed to the abatement contractor, who bid the job in two parts – the cost of abatement and a "salvage credit." During the job, the City modified the contract. As to the Seskos' Arsenal Way property, the City eliminated the bid "salvage credit" but

required the contractor to account for "actual salvage" receipts. As to the Seskos' Pennsylvania Avenue property, the City eliminated the salvage credit altogether. *See* App. Br. 4-20 (Case No. 33159-4-II); Declaration of Alan S. Middleton (Middleton Dec.) ¶¶ 2-3 (filed in support of motion for extension).

The Seskos argued in a prior appeal that the City had failed to properly credit them for salvage value, and specifically argued that the City was required to follow the execution statute (RCW 6.21) in disposing of the property – something the City admittedly failed to do. App. Br. *id.* 27-31. Division II of the Court of Appeals remanded a prior judgment against the Seskos with instructions to the trial court to determine whether the City had properly credited salvage value. The Court of Appeals did not decide the issue of whether the City had to comply with the execution statute. *See* Unpublished Opinion (Case No. 33159-4-II, Aug. 11, 2006) (Exhibit A to Middleton Dec.).

A trial was held in Kitsap County Superior Court. Judge Roof entered a written memorandum opinion on February 13, 2008. Middleton Dec. Ex. B. In part, Judge Roof held that the execution statute did not apply. On appeal, the Seskos would argue in part that Judge Roof erred in failing to require the City to perform the abatement in conformance with

the execution statute such that an accurate "salvage value" could be calculated. Middleton Dec. ¶ 6.

The trial court entered judgment against the Seskos on March 7, 2008. However, a copy of the judgment was not received by counsel for the Seskos until March 10, 2008. A Notice of Appeal was filed April 9, 2008, identifying the judgment entered on March 7, 2008. The Notice was therefore filed thirty-three days after entry of the judgment, but thirty days after receipt of the judgment by the Seskos' counsel. Middleton Dec. ¶ 7.

The Seskos filed a motion pursuant to RAP 18.8(b) seeking additional time within which to file the Notice of Appeal. On July 1, 2008, a panel of three judges of the Court of Appeals entered an order denying the motion without specifying its reasons. The Seskos filed a Petition for Discretionary Review in this Court, which was then treated as a Motion for Discretionary Review. On October 3, 2008, Commissioner Goff entered an Order Denying Review. A copy of the order is attached in the Appendix.

The Seskos hereby move to modify the Order Denying Review.

V. ARGUMENT

A. The Court of Appeals Erred by Denying the Seskos' Request.

1. An Extension of Time To File a Notice of Appeal May Be Extended in Extraordinary Circumstances.

RAP 18.8(b) permitted the Court of Appeals to extend the time for filing of a notice of appeal in "extraordinary circumstances":

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal . . . .

RAP 18.8(b). Petitioners are unaware of any authority establishing the standard of review for a denial of a motion made pursuant to RAP 18.8(b).

2. Extraordinary Circumstances Existed To Justify the Granting of an Extension.

The Seskos' counsel in this matter is Alan S. Middleton of the law firm of Davis Wright Tremaine LLP. At the time of entry of the judgment below, Mr. Middleton (b) (6) (b) (6) (b) (6) . Middleton Dec. ¶¶ 8-10. In fact, on the date judgment was entered, Mr. Middleton attended (b) (6) rather than appearing for the entry of judgment. *Id.* ¶ 11. Mr. Middleton had authorized the City's attorney to sign the proposed judgment for him. *Id.*

Mr. Middleton received a copy of the judgment on Monday, March 10, 2008, and immediately calendared the deadline for filing a notice of appeal for thirty days later – or April 9, 2008. This admittedly is thirty-three days after entry of the judgment. The distraction of personal issues led to the mistake. *Id.* ¶¶ 8-11.

Mr. Middleton did not catch this mistake before the deadline had passed. He attended a (b) (6) from April 3 through 6, 2008, and (b) (6) that weekend. He was (b) (6) back to work until April 8, 2008, and discovered the calendaring error late that day. *Id.* ¶ 12.

Prior cases addressing whether "extraordinary circumstances" exist do not foreclose the granting of an extension in this case. Below, the City relied upon two cases that are readily distinguishable from this one. To begin with, in *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 764 P.2d 653 (1988), the law firm representing Raymark as the intended appellant claimed the loss of one attorney and the heavy workload of the firm's appellate attorney as constituting "extraordinary circumstances" justifying an extension, but a key fact in the court's decision was that a notice of appeal was not filed until the plaintiff's counsel had contacted the firm seeking payment of the judgment. *Id.*, 52 Wn. App. at 766 ("nothing of record suggests that this matter would have resurfaced in

counsel's mind within a 'reasonable' time if Reichelt had not contacted counsel for payment of the judgment"). Further, there was no evidence that the firm was at all uncertain about when the notice needed to be filed. Here, a notice of appeal was filed prior to any contact by the City, and as Mr. Middleton has explained, the deadline was calendared for 30 days after receipt of the court's order by fax rather than 30 days after entry of the order.

In *Beckman v. State Dep't of Social & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000), there was no docketing of entry of judgment at all, and the court found the lack of any system to evidence a lack of due diligence. Here, by contrast, the event was docketed – but in error.

Neither *Reichelt* nor *Beckman* involved a government entity as the respondent. Particularly where, as here, a case involves allegations that government has improperly taken private property, this Court should be more concerned that appeals be decided on their merits than about the finality of judgments.

Finally, the position argued here does not invite wholesale abandonment of the finality of judgments. The facts are uncontested that the deadline was in fact calendared, but 30 days following receipt of the judgment by fax from the court rather than 30 days from entry, and that

the notice was filed on the 30th day following receipt of the judgment by fax. Few, if any, cases will follow that fact pattern.

3. Granting an Extension Would Prevent a Gross Miscarriage of Justice.

The City did not comply with the execution statute in performing the abatement on the Sesko property. The Court of Appeals did not decide the issue in the prior appeal. Both for purposes of this case and other nuisance abatements across the state, the issue of how a municipality must conduct an abatement in order to shift the cost of the abatement and properly credit salvage value to the property owner is of great importance. Further, as the trial court entered a substantial judgment against the Seskos based upon its conclusion that the execution statute does not apply, an extension was necessary to prevent a gross miscarriage of justice.

B. The Supreme Court Should Grant Review.

The Supreme Court should grant review because this matter "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The "extraordinary circumstances" under which the Court of Appeals should grant an extension to file a Notice of Appeal under RAP 18.8(b) is an issue that arises anytime a Notice of Appeal is not timely filed. There are few reported cases addressing what constitutes "extraordinary circumstances" pursuant to

RAP 18.8(b) justifying an extension of time for the filing of a Notice of Appeal. As the issue of what constitutes "extraordinary circumstances" will arise anytime a Notice of Appeal is not timely filed, the Court of Appeals' denial of the Seskos' motion and dismissal of this appeal have importance beyond the limits of this case. This Court has previously granted review to determine whether the denial of a motion pursuant to RAP 18.8(b) was correct. *E.g., State v. Kells,* 134 Wn.2d 309, 949 P.2d 818 (1998); *Scannell v. State,* 128 Wn.2d 829, 912 P.2d 489 (1996). It should do so here.

VI. CONCLUSION

For these reasons, the Supreme Court should modify the Commissioner's Order Denying Review.

RESPECTFULLY SUBMITTED this 3rd day of November, 2008.

Davis Wright Tremaine LLP
Attorneys for Petitioners/Movants

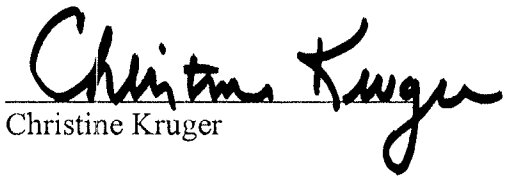
By _____
Alan S. Middleton, WSBA #18118

CERTIFICATE OF SERVICE

I, Christine Kruger, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on November 3, 2008, I served a copy of the foregoing document, via first class mail, upon the following counsel of record:

Mark E. Koontz
Bremerton City Attorney's Office
345 6th Street, Suite 600
Bremerton, WA 98337-1874

Executed this 3rd day of November 2008, at Seattle, Washington.



Christine Kruger

APPENDIX

THE SUPREME COURT
STATE OF WASHINGTON

RONALD R. CARPENTER
SUPREME COURT CLERK

SUSAN L. CARLSON
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October 3, 2008

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Re: Supreme Court No. 81998-0 - City of Bremerton v. William & Natacha Sesko
Court of Appeals No. 37574-5-II

Clerk and Counsel:

Enclosed please find the RULING DENYING REVIEW, signed by the Supreme Court Commissioner, Steven Goff, on October 3, 2008, in the above entitled cause.

Sincerely,

A. J. Carpenfelder

for Ronald R. Carpenter
Supreme Court Clerk

RRC:alb
Enclosure

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF BREMERTON,

Respondent,

v.

WILLIAM and NATACHA SESKO,

Petitioners.

NO. 81998-0

RULING DENYING REVIEW

The city of Bremerton brought this nuisance abatement action in 1997 against William and Natacha Sesko for operating illegal junkyards. The trial court ordered the Seskos to abate the nuisance. The Court of Appeals affirmed the trial court's decision. *City of Bremerton v. Sesko*, 100 Wn. App. 158, 995 P.2d 1257 (2000). Various trial court proceedings and appellate court reviews ensued, leaving the trial court to ultimately consider whether the city should have followed the sales under execution statute, chapter 6.21 RCW, in disposing of materials taken from the properties. The superior court held that the sales under execution statute did not apply, and it entered judgment against the Seskos on March 7, 2008. The Seskos filed a notice of appeal on April 9, 2008, three days late. The Court of Appeals informed the Seskos that the notice was not timely filed, and it told them that they could move for an extension of time under RAP 18.8(b) and that the matter was being placed on the motion calendar for dismissal. The Seskos moved for an extension, and the city responded. In an order dated July 1, 2008, the court denied the motion for extension of time. The Seskos now seek this court's review of the Court of Appeals decision.

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The time for filing an appeal will be extended only in extraordinary circumstances and to prevent a gross miscarriage of justice. RAP 18.8(b). "Extraordinary circumstances" include cases in which "the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988); *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998). Negligence, or lack of "reasonable diligence," does not amount to "extraordinary circumstances." *Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 695, 11 P.3d 313 (2000). It is incumbent upon an attorney to institute internal office procedures sufficient to assure that judgments are properly handled: "'The failure to take necessary steps, to that end, even during periods of unusual circumstances in an attorney's office, is not an acceptable excuse for any resulting failure to obtain personal knowledge of the entry of judgment on the part of counsel.'" *Beckman*, 102 Wn. App. at 696 (quoting *State v. One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226, 1231 (Me. 1982)). The court will ordinarily hold that the interest in finality of decisions outweighs the privilege of a litigant to obtain an extension of time. RAP 18.8(b). In light of this policy, the standard set forth in RAP 18.8(b) is rarely satisfied. *Shumway*, 136 Wn.2d at 395; *Reichelt*, 52 Wn. App. at 765.

Since the Court of Appeals denied an extension of time, and thus never accepted review, the Seskos may seek review by this court only by motion for discretionary review under RAP 13.5. *See* RAP 13.3; RAP 12.3. Review is appropriate under that rule only if the Court of Appeals (1) committed an obvious error which would render further proceedings useless, (2) committed probable error which either substantially alters the status quo or substantially limits the freedom of a party to act, or (3) so far departed from the accepted and usual course of proceedings

as to call for review by this court. RAP 13.5(b). The Seskos demonstrate no such error or departure from accepted practice.

Counsel for the Seskos candidly admits that he calendared the due date for the notice of appeal erroneously, choosing a date 30 days from his receipt of the trial court's decision rather than 30 days from the entry of the decision. *See* RAP 5.2(a) (time allowed for filing notice of appeal). Counsel says that he did not catch his mistake until the true deadline had passed. Counsel admits he does not know why he chose the March 10 due date, though he explains that he was distracted by his (b) (6) . (Counsel was at the (b) (6) on March 7, 2008, when the superior court entered its judgment.)

Perhaps it could be debated whether the circumstances here are sufficiently extraordinary to justify an extension of time under RAP 18.8(b). Counsel was understandably distracted by events about the time he made the error. But reasonable diligence would arguably have resulted in a timely filing. In this sense the case is like *Beckman*, where the attorneys individually managed and calendared their own cases and the office had no central system for catching administrative errors. *Beckman*, 102 Wn. App. at 695-96. Counsel's firm may have had a system in place for managing and calendaring cases, but it apparently had no system to catch an attorney's error in entering an incorrect due date for an appeal.

As importantly, the Seskos fail to adequately explain why an extension of time is necessary to prevent a gross miscarriage of justice. *Reichert* seems to suggest that the lost opportunity to appeal may itself constitute a gross miscarriage of justice. *Reichert*, 52 Wn. App. at 765-66. But that opportunity may be lost whenever a notice is untimely, so the *Reichert* formulation essentially reads this requirement out of the rule. Arguably, a gross miscarriage of justice occurs only when the late filing prevents

the remedying of a plainly unjust result. The Seskos say that they would have appealed the superior court's decision that the sales under execution statute does not apply, but they fail to explain why that decision was erroneous or how they were prejudiced.

Under the circumstances, the Court of Appeals did not commit obvious or probable error in denying the motion for extension of time. Accordingly, the motion for discretionary review is denied.

COMMISSIONER

October 3, 2008